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No. 88-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

v.

HARRIS N. MURABAYASHI, MIWAKO S. MURABAYASHI, WILLIAM H. EBINA, BETSY S. EBINA, and DURINE CHIYO KANAI,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The district court granted summary judgment in favor of petitioner Honolulu Federal Savings and Loan Association. Respondents, who did not cross-move for summary judgment, maintained that summary judgment was inappropriate for either party because of disputes as to material facts bearing on the underlying substantive legal issue. The court of appeals reversed and in effect directed the entry of judgment for respondents on a legal theory that had not been addressed by the parties in either court. The case presents the following questions:

1. Whether federal courts of appeals may reverse an award of summary judgment and direct judgment for the nonmovant when to do so would deprive movants of the opportunity to remedy or even respond to the defect in their cases identified for the first time on appeal.

2. Whether federal courts of appeals may, in any event, direct judgment for the nonmovant when the nonmovant opposed summary judgment on the ground that genuine disputes of material fact exist and conceded on appeal that such disputes precluded summary judgment in its favor.*

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*The parties are named in the caption. Respondents brought the case as a class action purporting to represent a class of similarly situated customers of petitioner. The district court declined to certify a class, however.

Petitioner Honolulu Federal Savings and Loan Association, which is a federally chartered savings and loan association, is a wholly owned subsidiary of H.F. Holdings, Inc. Petitioner also owns a 20 percent interest in SLH, Inc., and through its wholly owned subsidiary HonFed Financial Services Corporation, also owns a 30 percent interest in Wespar Financial Services, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On appeal from the district court's grant of petitioner's motion for summary judgment, the Ninth Circuit erroneously reversed and then, over the dissent of Judge Wallace, compounded that error by effectively directing the entry of judgment for respondents. These actions respectively denied petitioner its right under Rule 56 of the Federal Rules of Civil Procedure to establish that a triable issue exists, and its complementary right to present at trial all evidence relevant to disputed issues of fact that remained in the case. Under this decision and similar recent decisions of the federal appellate courts, litigants predictably will refrain from moving for summary judgment out of a justifiable concern that, even if they are successful, a federal court of appeals may reverse and enter judgment for the opposing party on a new legal theory without affording them the opportunity on remand to develop fully and litigate disputed facts relevant to that new legal theory. The decision below is so grossly in error, its impact on the petitioner so unduly harsh, and its potential adverse affect on summary judgment procedure so substantial that it must be set aside in the exercise of this Court's supervisory authority over the federal judiciary. Accordingly, petitioner prays that a writ of certiorari issue to review the judgment and opinion in this case.

OPINIONS BELOW

The unreported opinions of the district court dated November 2, 1982 and September 7, 1983, which to-

gether dismissed certain claims as time barred and granted summary judgment to the petitioner on the remaining claims, are reproduced in App. A, 1a-12a. The unpublished (and therefore unreported) opinion of the Ninth Circuit dated October 1, 1984, affirming in part, reversing and remanding in part, is reproduced in App. B, 13a-16a. The unreported August 11, 1986 opinion of the district court on remand, again granting summary judgment to the petitioner, is reproduced in App. C, 17a-25a. The unpublished (and unreported) June 3, 1988 opinion of the Ninth Circuit, reversing and remanding with instructions that in effect direct the entry of judgment for the respondents, is reproduced in App. D, 26a-30a.

JURISDICTION

The opinion of the court of appeals was issued on June 3, 1988. App. D, 26a. Petitioner's timely petition for rehearing was denied by the Ninth Circuit on September 6, 1988. App. E, 31a-32a. On November 28, 1988, Justice O'Connor issued an order extending to January 4, 1989, the time within which petitioner could file this petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may,. . ., move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law . . . .

* * *

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

STATEMENT OF THE CASE

A. Introduction

Respondents filed this action in 1981 to challenge a decision by petitioner, Honolulu Federal Saving and Loan Association (HonFed), to raise interest rates on certain loans by 1 percent. Initially, the district court entered summary judgment for HonFed, holding that the loan documents allowed the challenged interest rate increase. The Ninth Circuit reversed, holding that the loan documents were ambiguous regarding the aggregate amount by which the interest rate could be increased. The court remanded the case to allow the parties to present extrinsic evidence to resolve the perceived ambiguity.

On remand, the parties each produced extrinsic evidence: by HonFed in support of its motion of summary judgment, and by respondents, who did not cross-move, in opposition thereto. The district court granted HonFed's motion, concluding that the evidence indisputably established that under the terms of the loan agreements HonFed could raise interest rates by at least 1.5 percent each year—an amount more-than sufficient to permit the 1981 rate increase. Without purporting to disagree with the trial court's evaluation of the summary judgment record, the Ninth Circuit again reversed, holding that HonFed had not "met its burden" to resolve the ambiguity in the loan documents.

In reaching its result, the Ninth Circuit redefined HonFed's burden to require it to show by extrinsic evidence that the loan agreements authorized it to raise interest rates by as much as 6 percent annually. The Ninth Circuit then in effect directed judgment

for respondents without affording HonFed any opportunity to meet this newly announced burden. The court took this unusual action, over the dissent of Judge Wallace, despite the fact that respondents had expressly acknowledged that factual disputes regarding the amount by which interest rates could be raised precluded summary judgment in their favor.

B. The History Of The Litigation

In 1964, HonFed made various home loans to respondents. As relevant here, the promissory notes executed by respondents each provide that HonFed "at any time after three (3) years from the date of this note, and from time to time thereafter, may upon . . . three (3) months' written notice . . . increase the interest rate *then in effect* by not more than one and one-half percent (1 $^1/_2$%) per annum . . . ." App. A, at 6a (emphasis added). The parallel provisions in the accompanying mortgage agreements were identical except that they provide that HonFed could "increase the rate of interest *on said note* by not more than one and one-half percent (1 1/2%) per annum," upon giving respondents appropriate notice.[1] App. A, at 7a (emphasis added).

The original interest rate on each of the loans at issue was 6.25 percent. In 1974, HonFed increased the interest rate by 1.5 percent to 7.75 percent per annum. Respondents did not object to that interest rate increase.

Seven years later, in 1981, HonFed increased the interest rate again, this time raising it 1 percent,

[1] The respective interest rate increase provisions of the promissory notes and mortgage agreements shall be referred to collectively as the "escalation clauses."

from 7.75 to 8.75 percent. This time, however, respondents objected and filed suit asserting claims under various federal and state laws.[2] The gravamen of the action was that the 1981 rate increase was not authorized because the loan agreements—specifically the mortgage—precluded HonFed from raising the interest rate more than 1.5 percent over the original interest rate during the life of the loans.

HonFed moved to dismiss certain claims on statute of limitation grounds and sought summary judgment on the remaining claims. In its summary judgment motion, HonFed argued that while the escalation clauses limited each interest rate increase to no more than 1.5 percent, the frequency—and therefore the aggregate amount—of such increases was only limited by the three-month notice provision. The district court dismissed two claims on limitation grounds and, agreeing with HonFed's construction of the loan documents, granted summary judgment on the remaining claims.[3] App. A, at 12a.

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[2] Respondents' amended complaint contained five counts. Count I was for a declaratory judgment that the 1981 interest rate increase was barred by the loan agreements, while Counts II and III asserted claims under state law for failure to make accurate and complete disclosure on the financing statements that accompanied the loans. Count IV charged violation of the federal Truth-In-Lending Act, and Count V alleged deceptive and unfair trade practices under state law.

[3] The district court's decision of November 2, 1982, dismissed Counts II and III of respondents' amended complaint, and granted summary judgment as to Count I. App. A, at 8a. On September 7, 1983, the court issued an order granting petitioner's motion for summary judgment as to Counts IV and V. App. A, at 12a.

On the initial appeal of this case, the Ninth Circuit affirmed that part of the district court's ruling dismissing certain claims on statute of limitations grounds. The court, however, overturned the summary judgment in favor of HonFed on the remaining claims. The court acknowledged that the promissory notes allow HonFed "from time to time" to increase the interest rate from the rate "then in effect." App. B, at 15a. The court observed, however, that the mortgage agreements, which permit HonFed to raise the interest rate over the rate "on said note," did not contain the same phrase, "then in effect," as did the notes. The court reasoned that it was "unclear whether the phrase 'on said note' means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan." *Id.* Concluding that this "ambiguity" made the loan agreements " 'susceptible to more than one meaning'[,]" the Ninth Circuit instructed the district court on remand to permit the parties "to present extrinsic evidence to establish the terms of the home loan agreements[,]" with particular reference to the "amount of interest rate increase contemplated . . . ." *Id.*, at 15a-16a.

On remand, both sides conducted discovery to obtain extrinsic evidence with respect to the interest rate increase contemplated by the loan agreements. Moving again for summary judgment, HonFed offered the deposition testimony of six current or former officers and employees. The thrust of that testimony was that the loan agreements "allowed HonFed to increase the interest rate by as much as one and one-half percent (with three months notice), and that

HonFed could do so as often as once every year." App. C, at 20a. Respondents did not file a cross-motion for summary judgment, but simply opposed HonFed's motion, arguing that material facts were in dispute as to the intent of the parties on the "key issue" whether HonFed could raise interest rates more than 1.5 percent over the life of the loans.[4]

After evaluating the extrinsic evidence and applying the governing standards for granting summary judgment, the district court again granted HonFed's motion. The court found that HonFed had "met the ultimate burden of persuasion," and that the evidence HonFed had produced was "so overwhelming that were the case to go to trial, the court would grant a motion for directed verdict under Fed. R. Civ. P. 50(a)." App. C, at 24a.

Respondents again appealed to the Ninth Circuit. This time they argued that HonFed's evidence that interest rates could be raised by at least 1.5 percent each year was inconclusive and that, therefore, a genuine issue existed as to the amount by which HonFed could increase interest rates. Respondents maintained that this dispute precluded summary judgment for either side and required a trial.[5]

In a divided decision, the Ninth Circuit again reversed the summary judgment in favor of HonFed and remanded the case to the district court with instructions in effect to enter judgment for respondents.

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[4] Plaintiffs' Memorandum In Opposition To Motion For Summary Judgment, dated July 14, 1986 (hereinafter "Plaintiffs' Opp."), at 2.

[5] Appellants' Opening Brief, No. 86-2503 (9th Cir.), dated September 18, 1987 (hereinafter "Appellants' Opening Brief"), at 17.

App. D, at 26a-30a. In its unpublished opinion,[6] that court declared that "HonFed had the burden of proving that the meaning of the mortgage, construed against it, did not control the note." *Id.*, at 29a. The court stated that the "face of the note" allowed HonFed to raise the interest rate by as much as 6 percent per year, but that HonFed's officers did not believe "that that was what the bank could get . . . ." *Id.*, at 28a. Thus, on the basis of what HonFed's officers "must have believed," the Ninth Circuit held that "the note read together with the mortgage was ambiguous; that the ambiguity is to be construed against the drafter; and that therefore the maximum permissible interest rate on the loan was a raise of 1 1/2 percent during the life of the loan." *Id.*, at 29a. On this basis, the court of appeals reversed the judgment below, and remanded the case for "further proceedings not inconsistent with this disposition." *Id.*. Given that the court had resolved the interest rate increase issue against HonFed, the effect of the remand was to direct the entry of judgment for respondents.

Judge Wallace dissented with respect to the court's disposition of the case. App. D, at 29a-30a. He observed that by deciding the dispute as to the maximum interest rate increase permitted, the panel had gone beyond the single issue before to it on appeal: "did the district court err in granting summary judg-

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[6] This decision, like the court's first opinion, was designated by the panel to be "unpublished" pursuant to Rule 36-3 of the Ninth Circuit's rules, which prohibits the citation of such opinions except where the unpublished decision involves issues of res judicata, collateral estoppel, or law of the case. App. D, at 26a; *see also* App. B, at 13a.

ment to HonFed[?]" *Id.*, at 29a. Consequently, although agreeing with the majority that HonFed's extrinsic evidence did not justify summary judgment in its favor, Judge Wallace stated that the court "should simply reverse the summary judgment for HonFed and remand for trial" or to allow respondents to "bring their own motion for summary judgment . . . ." *Id.*, at 30a.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S DECISION, WHICH EFFECTIVELY GRANTS JUDGMENT FOR RESPONDENTS, WARRANTS REVIEW BECAUSE IT IS CONTRARY TO THIS COURT'S CASES AND SERIOUSLY UNDERMINES THE EFFICACY OF THE SUMMARY JUDGMENT PROCEDURE ESTABLISHED BY RULE 56

In *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986), this Court reaffirmed that Rule 56 "summary judgment procedure is properly regarded . . . as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.*, at 327, quoting Fed. R. Civ. P. 1. Prior to *Celotex*, misapplication of fundamental Rule 56 principles by the lower courts had produced "a regrettable state of affairs, frustrating the intent of those who drafted Rule 56 and of the Supreme Court and Congress which adopted it to further the efficient and economical resolution of issues not requiring an evidentiary trial." Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984). Thus, in order to insure the continued vitality of summary judgment practice, the Court in *Celotex* made clear that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

477 U.S., at 327.

The decision below stands accepted Rule 56 principles on their head, converting the summary judgment procedure into a "catch penny contrivance to take unawary litigants into its toils and deprive them of a trial. . . ."[7] Under the approach of the Ninth Circuit, success on a summary judgment motion may turn out to be quite a mixed blessing. Indeed, HonFed paid a very high price for succeeding on its motion.[8] Had HonFed not moved for summary judgment or even had the district court denied the motion, the case would have almost certainly proceeded to trial as respondents have at all times maintained that a trial is necessary to resolve disputed materials facts bearing directly on the interest rate increase issue.

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[7] *Whitaker* v. *Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).

[8] Although HonFed does not seek review of that part of the Ninth Circuit's decision that reversed the summary judgment in his favor, its failure to do so is in no way an agreement that the court below acted correctly in that regard. Rather, HonFed has refrained from pressing that issue in this petition because it does not view the state law questions involved in that part of the Ninth Circuit's decision to be worthy of this Court's consideration in the present posture of this case.

At trial, HonFed would have had the opportunity to present *all* relevant evidence to establish that the 1 percent interest rate increase in 1981 was permitted under the terms of the loan agreements. On the other hand, at the summary judgment stage, HonFed, as any other litigant seeking summary judgment, was not compelled to put on its entire case. Indeed, such a requirement would essentially destroy the purpose of Rule 56 to render the resolution of cases more efficient and economical. Furthermore, HonFed, as any other litigant seeking summary judgment, was precluded from supporting its motion with controverted testimony or documentary evidence. Such evidence, which might have been persuasive at trial, would have been plainly inappropriate for summary judgment because it calls upon the trier-of-fact to make credibility determinations or assess the weight of the evidence. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Ninth Circuit, however, directed judgment for respondents even though HonFed never had the occasion to develop and present its full case, and even though respondents admitted that they were not entitled to summary judgment because of disputed facts on the key issue in the case. As discussed more fully below, the harsh lesson of the Ninth Circuit's ruling is that a successful summary judgment movant not only may have victory erroneously snatched away on appeal, but also may have the appellate court deprive it of the opportunity to remedy or even respond to a previously unidentified defect in its case.

It is cold comfort to HonFed and other litigants who have been or may be similarly affected that the Ninth Circuit's ruling is contrary to this Court's de-

cision in *Fountain* v. *Filson*, 336 U.S. 681 (1949), which bars summary judgment to the nonmovant appellant where the appellee would thereby be deprived of the opportunity to meet a defect in its case identified for the first time by the appellate court. This Court has not, however, squarely addressed this issue for almost forty years, and during that time the lower federal courts have drifted further and further from its teachings. Indeed, in the last few years at least two certiorari petitions, including one from another Ninth Circuit decision, have been filed charging that those federal appellate courts had directed judgments for nonmoving appellants without affording the respective appellees the opportunity to demonstrate that there remained triable factual issues.[9]

Although a case involving the gross misapplication of Federal Rules of Civil Procedure may not, standing alone, normally warrant review by this Court, this case and the other recent cases portray a discernible, growing and significant erosion of the rule of *Fountain* v. *Filson* and, more generally, of the summary

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[9] *Potenze* v. *New York Shipping Assoc. Inc.*, 804 F.2d 235 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987) (No. 86-1462); *Federal Savings and Loan Ins. Corp.* v. *Angell, Holmes & Lea*, 838 F.2d 395 (9th Cir.), *cert. denied sub nom. Van Voorhis & Skaggs* v. *Federal Savings and Loan Ins. Corp.*, 109 S. Ct. 127 (1988) (No. 88-4). In this court, the respondents in those two cases both argued that the courts of appeals had not violated the rule of *Fountain* v. *Filson*. Because of the uncertainty regarding whether *Fountain* had been followed, this Court may well have determined that neither case presented an appropriate vehicle for reinforcing the *Fountain* rule. No such impediment exists in this case because respondents have no colorable argument that *Fountain* was followed by the majority of the panel below.

judgment procedure so recently reinvigorated in *Celotex*. Unless halted, the adverse consequences of this disturbing trend may be expected to accelerate exponentially. Fewer and fewer litigants will be willing to move for summary judgment if the price of success in the district court also carries with it the prospect of an adverse appellate ruling depriving the movant of the right to develop its case more fully on remand.[10] Such uncertainty would necessarily undermine this Court's recent efforts to convince both bench and bar that Rule 56 is not a "disfavored" practice, but is one of "the principal tools by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial *with the attendant and unwarranted consumption of public and private resources*." *Celotex Corp.* v. *Catrett*, 477 U.S., at 327 (emphasis added).

Accordingly, the Court should exercise its supervisory authority over the federal judiciary by removing this obstacle to the effectiveness of summary judgment practice and, in doing so, remind the various federal courts of appeals that they must comply with the fundamental principles set forth in Rule 56. Indeed, following the precedent of *Fountain* v. *Filson*, the Court might choose to act summarily to send this case back to the district court for trial or to allow

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[10] The *in terrorem* impact of the decision below is not relieved by the fact that the Ninth Circuit's decision was designated as "unpublished." Indeed, as members of the bar become aware that filing a motion for summary judgment may not only lead to judgment for the opposing party in the court of appeals, but also that the court of appeals may reach that result on the basis of essentially "secret" law, the negative impact on the utilization of the summary judgment procedure will be exacerbated.

respondents to move for summary judgment—the course correctly advocated by Judge Wallace's dissent below.

A. HonFed Was Deprived Of The Opportunity To Establish The Existence Of A Genuine Issue Of Fact Precluding Summary Judgment For Respondents

Paying due regard to the rights of litigants to have disputed claims or defenses presented at trial, Rule 56 of the Federal Rules of Civil Procedure makes summary judgment available only when there is no genuine, triable issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S., at 327. So that the district court is fully advised as to any genuine disputes of fact, Rule 56 expressly requires that the party threatened with summary judgment be given notice and an adequate opportunity to respond. Fed. R. Civ. P. 56(c). And while recent authority holds that district courts may grant party summary judgment to a nonmoving party if no material facts are in dispute, *see Celotex Corp.* v. *Catrett*, 477 U.S., at 326, "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law." 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2720, at 34 (1983).

These fundamental principles certainly apply with equal, if not greater, force in the courts of appeals because the appellate forum is not at all well-suited to demonstrating the existence of genuine issues of fact.[11] Thus, although courts of appeals have granted

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[11] For example, if the nonmoving party has not had the op-

summary judgment to the nonmoving party in the rare case in which there is absolutely no uncertainty regarding the facts,[12] this Court has never explicitly sanctioned even that practice.

In *Fountain* v. *Filson*, *supra*, the Court granted certiorari and reversed, without further briefing of the merits, a decision of the D.C. Circuit that directed judgment for a nonmoving party on the basis of a new legal theory that neither the district court nor the parties had addressed. Although reserving decision on the broader issue whether an appellate court could ever order summary judgment for the nonmoving party, the Court in *Fountain* specifically condemned the practice when "the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case[,]" and the original movant "would have had such an opportunity if a proper motion had been made by his opponent in the trial court." 336 U.S., at 683. The Court concluded that the D.C. Circuit had erred in this regard because there had been no occasion in the district court for the petitioner there to dispute facts material to the legal theory adopted on appeal and not considered below. The decision of the Ninth Circuit in this case repeats that error.

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portunity to take full discovery, Fed.R.Civ.P. 56(f) permits the district court to refuse "the application for judgment," or to continue the matter so that the adverse party can take discovery in order to establish whether there is a genuine issue as to a material fact. *See Celotex Corp.* v. *Catrett*, 477 U.S., at 326.

[12] *E.g.*, *E.C. Ernst, Inc.* v. *General Motors Corp.*, 537 F.2d 105 (5th Cir. 1976); *see* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2720, at 35.

It is, of course, essential that litigants "not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *see also Singleton* v. *Wulff*, 428 U.S. 106, 120-21 (1976). Unless the issue was "clearly framed by the proceedings below so that the parties had a legitimate chance to submit all relevant materials and argue their implications, it is clearly unjust for the appellate court to direct the issuance of summary judgment" *sua sponte* on appeal. *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1537 (D.C. Cir. 1984), *vacated and remanded on other grounds*, 471 U.S. 1113 (1985).

The Ninth Circuit's decision faults HonFed for not meeting its "burden" to resolve the ambiguity in the loan documents by presenting extrinsic evidence to support a right to raise interest rates by as much as 6 percent each year—what that court characterized as the "plain meaning" of the escalation clause in the promissory notes. App. D, at 28a. HonFed, however, had no reason prior to that decision to believe that to prevail on summary judgment, or even at trial, it had to establish the right to raise interest rates by that amount. The challenged 1981 rate increase was only 1 percent over the rate in effect since the 1974 increase. Whether HonFed had the right to raise the rate by as much 6 percent per year was, in the posture in which this case came to the Ninth Circuit on the second appeal, at most a purely academic and hypothetical question. Nothing in the court of appeals' first opinion put HonFed on notice that its burden on remand was to prove by extrinsic evidence that the parties to the loans intended interest rate in-

creases of as much as 6 percent each year. The Ninth Circuit did not clearly frame that as petitioner's burden, and neither the district court nor the parties treated it as such on remand.[13]

HonFed thus "was fully justified in that circumstance in not coming forward with proof" on the 6 percent issue, for it "had nothing to meet under the District Court's view of the [case]." *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 533 (1958). Accordingly, by denying HonFed an opportunity to present evidence supporting its ability to raise interest rates by 6 percent each year, the Ninth Circuit deprived HonFed of its fundamental right under the Federal Rules (and under the Constitution as well) to meet the case against it. *See, e.g., Saunders* v. *Shaw*, 244 U.S. 317, 319 (1917) (due process prohibits entry of judgment by appellate court against a party when that party had no opportunity to present evidence on issue that was not considered by court below).

Moreover, had respondents anticipated the novel legal theory manufactured by the Ninth Circuit, which

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[13] Indeed, respondents' opposition to HonFed's summary judgment motion did not argue that summary judgment should be denied because HonFed had failed to show a right to raise interest rates by 6 percent; rather, respondents asserted that HonFed's evidence as to the intent of the parties was inconclusive as to whether the loan agreements allowed HonFed to raise interest rates by 1.5 percent each year, and that a trial was thus necessary to determine by exactly how much interest rates could be raised. Plaintiffs' Opp., at 4-5. As evidenced by the fact that it granted HonFed summary judgment, the district court did not understand HonFed's burden to require that it establish the right to raise rates by 6 percent per year.

they did not, and moved for summary judgment pointing to the absence of evidence supporting HonFed's right to raise interest rates 6 percent, which they did not, HonFed would have had the requisite notice and the opportunity to oppose that motion. Fed. R. Civ. P. 56(c). Testimony and other evidence might have been adduced to the effect that interest rate increases of 6 percent annually were within the scope of the loan agreements. Such evidence might or might not have been as "overwhelming" as the evidence that was presented in support of HonFed's motion for summary judgment. The crucial point, however, is that the court of appeals deprived HonFed of the opportunity to present evidence sufficient at least to raise a genuine factual issue and thereby withstand any summary judgment motion that respondents might have filed.

Thus, as in *Fountain* v. *Filson*, the court of appeals' ruling in favor of respondents was "made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." 336 U.S., at 683. HonFed was thus deprived of "the opportunity to remedy the defect which the appellate court discovered in its case." *Id. See, e.g.*, *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S., at 531-3 (where appellate court announces a legal standard that makes relevant factual questions that were not previously regarded by the parties as relevant, court may not direct judgment based on existing record, but must remand the case to the district court to allow the parties the opportunity to establish relevant facts).

The Ninth Circuit's failure even to cite *Fountain* v. *Filson* is silent testimony to the erosion that the

salutary rule announced in that case has suffered in the last forty years. Few litigants will gamble with summary judgment motions if the price of success in the district court also carries the possibility that an appellate court will enter judgment for the other side without giving the movant the opportunity to meet the case against it. As a result, summary judgment will be utilized less often, and cases that should be resolved by summary judgment will instead go to trial, thereby unnecessarily consuming public and private resources.

B. The Record Below Demonstrates The Existence Of Disputed Material Facts Precluding Judgment In Favor Of Respondents

In addition to the reasons already discussed, the Ninth Circuit should not have directed judgment in favor of respondents because even the summary judgment record, without further supplementation as HonFed was entitled to do on remand, indicated that a genuine triable issue existed as to whether the loan agreements limited HonFed to an aggregate 1.5 percent interest rate increase, or permitted HonFed to raise rates by as much as 6 percent per annum.

Under Rule 56, it is axiomatic that summary judgment is proper only if there is no dispute as to any material fact. *Fountain* v. *Filson*, 336 U.S., at 683. The burden, of course, is on the party seeking summary judgment to establish the absence of any "genuine issue" of material fact, with any doubt as to the existence of a triable issue to be resolved against the moving party. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Consequently, summary judgment should not be granted unless it is clear that a trial

is unnecessary. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S., at 255.

In assessing the propriety of summary judgment, the district court makes the threshold determination whether there "are any genuine factual issues that properly can be resolved only by a finder of fact . . . ." *Id.*, at 250. This standard mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Id.*, at 251; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944). In essence, the test under each is the same: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S., at 251-52. The court may not, however, "weigh the evidence and determine the truth of the matter. . . ." *Id.*, at 249. As the Court stated in *Anderson*:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Id., at 255. Thus, at the summary judgment stage of the case, the evidence of the party threatened with summary judgment is to be credited and all justifiable inferences must be drawn in its favor. *Adickes* v. *S.H. Kress & Co.*, 398 U.S., at 158-59; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

As this Court stated in *First National Bank of Arizona* v. *Cities Services Co.*, 391 U.S. 253, 288-89 (1968), to defeat summary judgment, "all that is re-

quired is that sufficient evidence supporting the claimed factual dispute be shown to require a jury . . . to resolve the parties' differing versions of the truth at trial." That is undeniably the case here. A rational trier-of-fact could easily have concluded that, in the totality of the circumstances, the promissory notes, which indisputably allow an annual 6 percent interest rate increase, better reflected the intent of the parties than the "ambiguous" language of the mortgage agreements.

Moreover, while federal courts may have the authority to grant summary judgment to the nonmoving party in appropriate circumstances, the failure of a party to make such a motion cannot possibly relieve it of the burden of establishing the absence of disputed material facts. Nor can the absence of a motion allow the court to draw inferences in the nonmoving party's favor, or excuse the court from resolving any doubt against granting summary judgment. In this case, respondents made no pretense that they were entitled to summary judgment. They did not move for summary judgment in the district court because they believed that the "relevant extrinsic evidence . . . must go to the jury that ultimately will decide the true and proper meaning to be given the language used [in the loan agreements]."[14] And on appeal they specifically acknowledged that the evidence was not so one-sided as to justify summary judgment in their favor.[15] In the face of these concessions, there was plainly no basis for the Ninth Circuit's implicit conclusion that a fair-minded jury could not return a

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[14] Plaintiffs' Opp., at 3.

[15] Appellants' Opening Brief, at 17.

verdict in HonFed's favor on the evidence already of record.

CONCLUSION

The decision below manifests what appears to be a disturbing trend in the courts of appeals to erode the rule laid down in *Fountain* v. *Filson*, and thereby to make hazardous the use of the summary judgment procedure established by Rule 56. Discouraging the use of the summary judgment in this fashion will undoubtedly undermine the goal of efficient and economical disposition of cases in the federal courts so recently reemphasized by this Court's decision in *Celotex*. Unless this trend is interdicted in this case, the continued vitality of summary judgment practice as an economical and efficient means for isolating factually inadequate claims and defenses will be seriously undermined. Few litigants will resort to Rule 56 knowing that, if they win in the district court but lose on appeal, they may forfeit the opportunity to litigate their claims or defenses fully at a trial.

Accordingly, the Court should grant this petition for a writ of certiorari.[16]

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[16] As suggested in the text *supra*, this Court might well choose to act summarily in this case by granting certiorari and reversing the decision below, as it did in *Fountain* v. *Filson* itself. Because respondents took the position on their appeal that they had no right to the entry of judgment in their favor, there is no concern that this Court's acting summarily in this case would unfairly disadvantage respondents.

January 4, 1989

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0423
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0459
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS II AND III AND MOTION FOR SUMMARY JUDGMENT AS TO COUNT I

Defendant, Honolulu Federal Savings (HONFED), moved this court for summary judgment as to Count I, and to dismiss Counts II and III of plaintiffs' Amended Complaint. These matters came before this court on June 16, 1982, for hearing and argument. The court has considered the memoranda of parties and has examined the record and case law concerning these motions.

MOTION TO DISMISS COUNTS II AND III:

HONFED originally raised the defense of statute of limitations to Counts II and III of plaintiffs' original complaint. On December 18, 1981, this court heard and granted that motion, and on January 4, 1982, entered its order. Plaintiffs have since amended their complaint to allege equitable grounds for tolling the statutes.

Counts II and III of the Amended Complaint are identical to the original counts in that they allege failure to make necessary disclosures, in violation of H.R.S. § 407-87; and failure to provide accurate and complete disclosures on financing statements, in violation of H.R.S. § 477-2.[1] Plaintiffs have now added allegations of "fraudulent concealment" and "lulling". This court has already determined that absent some equitable basis, the counts should be dismissed by reason of the running of any and all relevant statute of limitations.[2]

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[1] Count I, on the meaning of the contract language, shall be considered *infra*; Counts IV and V of plaintiffs' complaint are not subjects of these motions.

[2] See this court's Order Granting Motion to Dismiss filed January 4, 1982; see also, *Pacific Concrete F.C.U. v. Kauanoe*, 62 Haw. 334 (1980). *Davis v. Edgemere Finance Co.*, 523 FS 1121, 1125-26 (D.C.M. 1981), citing *Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir. 1974); *Steams v. Page*, 48 U.S. (7 How.) 818, 829 (1849).

To constitute fraudulent concealment such as to avoid the statute of limitations, the plaintiff must have plead, and the court must be able to draw the reasonable factual inference that:

1) there was concealment of facts by the party raising the statute;

2) the plaintiff failed to discover the facts which are now the basis of the action; and

3) the plaintiff exercised due diligence in seeking to discover those facts but some affirmative act of fraudulent concealment frustrated his discovery.

In evaluating those necessary elements, the applicable law depends upon the degree of affirmative conduct alleged or shown in perpetrating the fraudulent concealment.[3] Thus, if defendant has committed some affirmative act of fraudulent concealment such as to frustrate discovery, a court would be more justified in permitting avoidance of the statute of limitations. Put another way, a court might toll the statute only until plaintiff, exercising due diligence, would get such notice as to "impel a reasonable man in his position to make inquiry." *John Hopkins University v. Hutton*, 488 F.2d 912, 917 (4th Cir. 1973) (Field, J.) (quoting Friedman, *Delay as a Bar to Rescission*, 26 Cornell L.Q. 426, 432 (1941)), *cert. denied* 416 U.S. 916 (1974).

Plaintiffs, in their First Amended Complaint (FAC), have alleged that HONFED "fraudulently concealed, through words and conduct, its intention" and that plaintiffs were "lulled" into believing the interest rate could never be raised more than one and one-half percent (1-1/2%) per annum over the whole term of the loan. (FAC filed April

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[3] *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 597 (4th Cir. 1976); *City of Detriot v. Grinnel Corp.*, 495 F.2d 448, 461 (2nd Cir. 1974).

7, 1972, ¶¶ 48-61; pp. 19-23.) Plaintiffs admit in their FAC that they executed notes in 1963 and 1964; that each note was secured by a first mortgage; that at the time of closing HONFED did provide plaintiffs with a "Loan Settlement Statement", but not with duplicate copies of notes and mortgages.

A careful examination of plaintiffs' FAC indicates that while they have made bold and bare assertions of fraudulent conduct by defendant, nevertheless they have not set forth just what affirmative conduct of the defendant, amounting to such "fraudulent concealment" as would "lull" plaintiffs into lethargy, actually occurred. Plaintiffs merely state that the "variable interest rate" was not sufficiently explained by HONFED. This alone does not constitute "fraudulent concealment" sufficient to toll the statute of limitations. Even when this court gives the plaintiffs, as opposing parties, the benefits of all reasonable inferences in their favor, any examination of plaintiffs' allegations fails to indicate any "affirmative conduct" on defendant's part to "conceal" anything from plaintiffs or "lull" plaintiffs into inaction. Unlike *Cunha v. Ward Foods, Inc.*, 501 F.2d 820 (D.C. Haw. 1980), plaintiffs have neither pled nor shown any affirmative conduct such as to mislead them or conceal the "true nature" of defendant's actions. HONFED did not publish any intentionally or manifestly fraudulent statements concerning their loans; nor is there any indication of any affirmative acts to mislead plaintiffs or to lull them into inaction. Rather, the record, by plaintiffs' own account, indicates the plaintiffs entered into a contract for loans with full access to all documents.

The second element necessary to permit plaintiffs to avoid the statute requires "non-discovery" of the alleged "concealed" information. Plaintiffs offer affidavits to the effect that they did not know the meaning given their notes and mortgages by HONFED. While defendant argues the meaning was clear on the face of the documents, nevertheless this court, drawing all reasonable inferences

in favor of the plaintiffs as the non-moving party, for this motion assumes plaintiffs' ignorance and "non-discovery".

However, the third element to be satisfied in plaintiffs' quest to avoid the statute of limitations is that plaintiffs exercised "due diligence" in seeking to discover the facts upon which they now base their claim. Such diligence is not necessarily a one-shot inquiry, but at least a reasonable inquiry at the appropriate time is demanded.

It is conceded that at the closing of the notes and mortgages, the plaintiffs had access to all documents. Both parties had equal rights and obligations to examine those documents. A diligent examination of those documents would have then at least alerted a reasonable person to the possibility of interest increases exceeding one and one-half percent per annum over the whole life of the loan. Even if this court were to draw the most extreme inference in favor of the plaintiffs, viz., that a reasonable person would not read and ask questions about the terms of the notes and mortgages he/she was signing, nevertheless, the raising of the interest "to the max" in 1974 should again have put plaintiffs on notice and would "impel a reasonable man in [that] position to make inquiry." *John Hopkins University v. Hutton, supra.* Either of these dates is so distant that the possible bar of the statute of limitations becomes manifest.

MOTION FOR SUMMARY JUDGMENT ON COUNT I:

Plaintiffs in Count I of their FAC argue that any "increase or decrease in the annual interest rate on plaintiffs' respective notes *for the remaining term of the notes* is limited to a maximum of one and one-half percent (1-1/2%) per annum." (Emphasis added.) FAC, ¶ 32, p. 14. In the next paragraph, plaintiffs claim that increases "*over the original contract annual interest rate*" of more than one and one-half percent have been attempted by

defendant. (Emphasis added.) FAC, ¶ 33, p. 14.[4] Plaintiffs continue in Count I to offer their "reasonable interpretations" of the language in the notes, concluding that the "language quoted from the note is unclear, ambiguous and is subject to at least two interpretations . . . ." FAC, ¶ 38, p. 16. Finally, plaintiffs add that such ambiguities were not and could not have been discovered until 1981 because defendant "fraudulently concealed" its intentions to raise the interest and that defendant "lulled" plaintiffs into nonaction. FAC, ¶¶ 44-46, p. 18.

HONFED's position is that this court may examine the language of the notes to determine if such language is or is not ambiguous; if the court finds the language unambiguous, then it may determine the contract's meaning as a matter of law.[5] If, however, an ambiguity is evident, then extrinsic evidence may properly be admitted to help ascertain the intended meaning of the parties.[6]

The relevant language of the note is:

> It is hereby further agreed that the holder, at any time after three (3) years from the date of this note, *and from time to time thereafter*, may upon not less than three (3) months' written notice to the undersigned, decrease or increase the interest rate then in effect by not more than one and one-half per cent (1 1/2%) per annum, provided that after receipt of such notice the undersigned may within such three (3) months' period prepay the balance then remaining unpaid

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[4] This language used by plaintiffs operates adversely to their argument, as discussed more completely *infra* at p. 8.

[5] "Whether a contract is ambiguous is a question of law. . . ." *United States v. Sacramento Municipal Utility District*, 652 F.2d 1341, 1343-44 (9th Cir. 1981) and cases cited.

[6] *Restatement (Second) of Contracts*, §§ 200-204.

> without the payment of any penalty. [Emphasis added.]

The relevant language of the corresponding mortgage states:

> It is further agreed that the Mortgagee may at any time after three (3) years from the date of said note hereby secured, *and from time to time thereafter*, decrease or increase the rate of interest on said note by not more than one and one-half percent (1 1/2%) per annum, upon giving three (3) months' written notice to the Mortgagor, in which event the Mortgagor may within said three (3) months' period prepay the balance then remaining unpaid on said note without the payment of any penalty. [Emphasis added.]

As can be seen, the only noticeable difference between the two is the use of the phrase "on said note" in the mortgage in place of "then in effect" in the note. This is not significant and changes no meaning since the former is merely an incorporation by reference of the note into the mortgage. The meaning of both instruments is clear and unambiguous.

A fair and straight-foward reading of the language in the respective notes and mortgages indicates that, taken as a whole, the instruments permit HONFED, as holder of the notes, to increase (or decrease) the interest rate on the notes from time to time. However, HONFED's rights are limited by the following conditions: a three (3) year grace period after closing of the loan; three (3) months' written notice, during which time borrower may pay off the loan without penalty; any periodic increases (or decreases) are limited to a maximum of one and one-half percent ($1^1/_2$%) per annum from the interest rate then in effect.

To give either instrument the meaning plaintiffs suggest would amount to a rewriting of the contracts between the parties. The court would have to insert language to the effect that "all increases (or decreases) of the interest rate cannot vary more than one and one-half percent (1-$^1/_2$%) per annum *above or below the original interest rate on said note* . . . ." This the court cannot do. Plaintiffs' own language in their complaint shows that for them to succeed such additional terms would have to be inserted to vary the meaning of the instrument. (See n. 4, *supra*, p. 6.)

Based upon the above findings and conclusions of law, this court holds, as a matter of law, that plaintiffs' Counts II and III are barred by the applicable statute of limitations; that the contract language of the respective notes and mortgages is clear and unambiguous and are to be interpreted as indicated by this decision.

IT IS THEREFORE ORDERED that defendant's motion to dismiss Counts II and III is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment as to Count I is GRANTED.

DATED: Honolulu, Hawaii, November 2, 1982.

Martin Pence
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al.,	)	Civil No. 81-0423
Plaintiffs,	)	
vs.	)	ORDER GRANTING MOTION FOR RECONSIDERATION AND REVERSING COURT'S ORDER OF MAY 6, 1983
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

HARRIS N. MURABAYASHI, et al.,	)	Civil No. 81-0459
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

ORDER GRANTING MOTION FOR RECONSIDERATION AND REVERSING COURT'S ORDER OF MAY 6, 1983

Defendant Honolulu Federal Savings filed a Motion for Reconsideration of this court's May 6, 1983 Order. That Motion raised several objections to the court's Order, and directed this court's attention to facts and legal theories which had not been apparent to this court before.

Defendant contends that the May 6, 1983 Order erred in several respects. First, defendant argues that plaintiffs cannot, as a matter of law and fact, be allowed to choose the method by which increases in the interest rate are to be factored into the payment schedule. Defendant points out that most of the loans in question were issued for the maximum time period permitted by the law governing its loans. The C.F.R. regulations then in effect and controlling plantiffs' first mortgage loans set a 30-year limitation on their duration. Thus, even if plaintiffs were given the "choice" to either increase their monthly payments or to extend the repayment period, in most cases, because of that 30-year limitation, they would only have the right to *increase* each monthly payment.

Defendant also contends that because the first (1974) interest increase was implemented through a "unilateral" decision by HonFed, plaintiffs have waived any right to object to a similar approach being used with the 1981 increase.

Defendant's arguments have merit. After reviewing the law referenced by defendant in its latest brief, and after oral argument, this court concludes that the defendant is bound by the rules promulgated by the Federal Home Loan Bank Board and could not offer the plaintiffs an option which is foreclosed by controlling federal regulation. This court's earlier Order regarding the provision of an "option" for plaintiffs/borrowers cannot be applied.

The promissory notes are governed by the federal regulations in effect when the loans were made. As indicated

above, those regulations at that time set a 30-year limitation on the duration of first mortgage loans. *See* 12 C.F.R. § 545.6-1 (1963). Honfed had already attempted to accommodate borrowers by allowing them to extend their loan terms up to that limit, while at the same time offering them the alternative of increasing each monthly payment.

Defendant's second argument asserts that plaintiffs have waived any objection they might have had to the 1981 unilateral interest rate hike. The court finds this argument persuasive. Plaintiffs impliedly agreed to the methods implemented by defendant in 1974, and have thereby constructively waived any objection to those methods.

THE ESCALATION PROVISION

Defendant argues that this court's interpretation of the permissible interest increase provided for by the refinancing statement was not only erroneous, but was not even urged by the plaintiffs. Specifically, defendant contends that the "one time only" interpretation adopted by this court is contrary to the facts of this case and could not have been argued by any reasonable borrower.

Unfortunately, this court's Order of May 6, 1983, inaccurately reflected the court's opinion in one respect. On p. 5 of that Order, the sentence that reads, " . . . would justify a borrower's belief that the interest rate on his note could only be adjusted once during the term of the note," should read, " . . . would justify a borrower's belief that the interest rate on his note could only be adjusted once a year, for a maximum per year increase of 1.5%." This conclusion was supported by certain terms in the notes, including descriptions of incremental interest rate hikes. Defendant argues that the court's reliance on these descriptions of interest increases is misguided and cannot, as a matter of law, serve as the basis of a TILA violation. This court now agrees. In its Motion for Reconsideration, defendant highlighted for the court certain regulations which *require* a lender to set forth for the borrower the

very terms which this court, erroneously, previously found to be confusing. *See* 12 C.F.R. § 226.8(b)(8)(iii) and (IV). As such, this court cannot hold that those terms are misleading.

Defendant points out that the purpose behind TILA is to provide consumers with sufficient information to enable them to compare the available costs of credit. *Dixey v. Idaho First National Bank*, 677 F.2d 749, 751 (9th Cir. 1978). Despite certain differences between the terms of the notes and the provisions of the refinancing statement, plaintiffs were not at all precluded from credit shopping. The refinancing statement provided that upon learning of the 1981 interest increases, plaintiffs could prepay the balance of their outstanding loans without incurring any penalties, and could seek financing elsewhere. Credit shopping was, in fact, encouraged. Thus, the purpose behind TILA was served, despite certain word discrepancies in the HonFed instruments.

In light of the above and new aspects of the applicable law called to this court's attention by defendant's Memorandum in Support of Motion for Reconsideration, this court hereby VACATES its previous Order of May 6, 1983, and thereby dissolves the proposed class and withdraws any reference to payment of plaitiffs' attorneys' fees.

This court hereby GRANTS defendant's Motion for Summary Judgment as to Counts IV and V.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Sept. 7, 1983.

Martin Pence
UNITED STATES DISTRICT JUDGE

APPENDIX B

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRIS N. MURABAYASHI; MIWAKO S. MURABAYASHI; WILLIAM H. EBINA; BETSY S. EBINA; and DURINE CHIYO KANAI, borrowers, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally funded chartered savings and loan association, Defendant-Appellee.	Nos. 83-2502/2503 D.C. Nos. C-81-0423-MP C-81-0459-MP MEMORANDUM*

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Argued and submitted - May 15, 1984

Decided - October 1, 1984

Appeal from the United States District Court
for the District of Hawaii
Martin Pence, District Judge, Presiding

Before: SCHROEDER and NORRIS, Circuit Judges, and MARSHALL,**District Judge.

Appellant homeowners challenge Honolulu Federal Savings and Loan Association's (HonFed) 1981 decision to raise the interest rates on their home loans by 1.0 percent per annum. They allege that the increase violates the terms of the loans, several Hawaii statutes, and the Federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.* (1976) (amended 1980) (TILA). The district court dismissed two of the state claims on statute of limitations grounds and granted summary judgment for HonFed on the remaining claims. We affirm in part and reverse in part.

The district court correctly held that the statute of limitations bars the homeowners' claims under Hawaii Rev. Stats. § 407-87 (1976) and § 477-2 (Repealed 1982). Lulling is inapplicable to the present case, *see Maunian Hotel, Inc. v. Maui Pineapple Co.*, 52 Hawaii 563, 569-70, 481 P.2d 310, 314-15 (1971), and the homeowners have not pleaded sufficient facts to establish fraudulent concealment. *Au v. Au*, 63 Hawaii 210, 215, 626 P.2d 173, 178 (1981).

Summary judgment on the remaining claims was premature. In granting summary judgment against the homeowners' claim that the 1981 increase violated the terms of their loan agreements with HonFed, the district court held that the loan agreements' terms unambiguously per-

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** Honorable Consuelo Bland Marshall, United States District Judge for the Central District of California, sitting by designation.

mit HonFed to raise the interest rate 1.5 percent per annum every three months, or 6 percent per year. The court based its conclusion on the language of the promissory notes that allows HonFed "at any time after three (3) years from the date of this note, and from time to time thereafter" to increase the interest rate from the rate "then in effect."

The promissory notes, however, do not comprise the entire agreement that we must interpret. Hawaii law provides that where a promissory note and a mortgage are executed at the same time, they must be construed together "and the terms of either are qualified by any provision of the other. . . ." *Sanborn v. Chang Yau*, 32 Hawaii 420, 424 (1932). *See generally* 10 C.J.S. *Bills and Notes* § 45 (1938). Moreover, unclear language in a mortgage is resolved against the drafter. *State Savings & Loan Association v. Kauaian Development Co., Inc.*, 62 Hawaii 188, 613 P.2d 1315 (1980). The mortgages in the present case do not permit HonFed to raise the interest rate over the rate "then in effect," but over the interest rate "on said note." It is unclear whether the phrase "on said note" means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan.

We therefore conclude that the phrase "on said note" used in the mortgages is ambiguous because "there is a doubt" about its meaning. *See Government Employees Insurance Co. v. Franklin*,—Hawaii—,—, 662 P.2d 1117, 1119 (1983); *MPM Hawaiian, Inc. v. World Square*, 666 P.2d 622 (Hawaii Ct. App. 1983). The ambiguity in the mortgages and the variance between the language in the mortgages and the promissory notes make the home loan agreements "susceptible to more than one meaning." *Air[illegible], Inc. v. Horizon Cargo Transport, Inc.*, -Hawaii-, 670 P.2d 1277, 1280 (1983). Accordingly, the parties should

the terms of the home loan agreements. *See Midkiff v. Castle & Cooke, Inc.*, 45 Hawaii 409, 420-22, 368 P.2d 887, 894 (1962).

It follows that whether the homeowners can claim that the 1981 refinancing statement violated the TILA and whether they have standing to bring a claim under Hawaii Rev. Stat. § 480-2 (1976) must await final determination on the amount of interest rate increase contemplated in the home loan agreements.

Affirmed in part, reversed and remanded in part.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0423
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

HARRIS N. MURABAYASHI, et al.,	)	CIVIL NO. 81-0459
Plaintiffs,	)	
vs.	)	
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally chartered savings and loan association,	)	
Defendant.	)	

DECISION

Defendant Honolulu Federal Savings and Loan Association's ("HonFed") Motion for Summary Judgment came on for hearing on Wednesday, July 30, 1986. Susan Oki Mollway and Richard Clifton appeared for HonFed, and W. Gregory Chuck appeared on behalf of plaintiffs Harris N. Murabayashi, Miwako S. Murabayashi, William H. Ebina, Betsy S. Ebina and all other similarly situated borrowers. After examining the memoranda, exhibits, and deposition testimony, and hearing the arguments of counsel, the court granted summary judgment for HonFed on plaintiffs' remaining claims. This decision provides additional detail to the court's oral ruling.

I. Background

This action concerns a challenge brought by the above named homeowners in connection with home loans issued by HonFed in 1964. The original complaint set forth plaintiffs' "reasonable interpretation" of the language of the notes and argued that HonFed could not increase the interest rate more than one and one-half percent over the original six and one-quarter percent rate. According to plaintiffs, HonFed's 1981 interest rate increase therefore violated the terms of the home loan agreements.

In addition to Count I described above, HonFed allegedly failed to make adequate disclosure (Count II—H.R.S. § 407-87), filed to provide accurate and complete disclosures on financing statements (Count III—H.R.S. § 477-2), violated Federal Truth in Lending Laws ("TILA") and Federal Reserve Board Regulation "Z" (Count IV—15 U.S.C. § 1639, 12 C.F.R. 229), and committed unfair and deceptive trade practices (Count V—H.R.S. § 480-2). The court dismissed Counts II and III on statute of limitations grounds and granted summary judgment on the remainder of the complaint.

Plaintiffs challenged the orders of dismissal and summary judgment and in a memorandum opinion, the Ninth Circuit affirmed in part and reversed in part. While the court found that the statute of limitations barred the homeowners' claims under H.R.S. §§ 407-87 and 477-2, the panel went on to rule that summary judgment on the remaining claims was premature.

Construing the note and the mortgage together ("where a promissory note and a mortgage are executed at the same time, they must be construed together 'and the terms of either are qualified by any provision of the other. . . . [*citing* Hawaii law]' " Opinion at 2), the court found the phrase "on said note" ambiguous. Specifically, the court wrote:

> The mortgages in the present case do not permit HonFed to raise the interest rate over the rate "then in effect," but over the interest rate "on said note." It is unclear whether the phrase "on said note" means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan.

(*Id.*)

After finding an ambiguity in the mortgage based on doubt over the meaning of the phrase "on said note," the court went on to say:

> The ambiguity in the mortgages and the variance between the language in the mortgages and the promissory notes make the home loan agreements "susceptible to more than one meaning." *Aigor, Inc. v. Hoizon Cargo Transport, Inc.*, 66 Haw. 590 (1983). Accordingly, the parties should be allowed to present extrinsic evidence to establish the terms of the home loan agreements.

See Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 420-422 (1962).

(*Id.* at 3.)

The Ninth Circuit then ruled that plaintiffs' claim that the 1981 refinancing statement violated the TILA and their state unfair/deceptive trade practices claim "must await final determination on the amount of interest rate increase contemplated by the home loan agreements." (*Id.*)

Thus, the mandate of the court of appeals called for the parties to gather extrinsic evidence to establish the terms of the home loan agreements. For purposes of the instant motion, the court must decide whether that evidence presents a sufficient disagreement regarding the propriety of HonFed's 1981 escalation to require submission to a jury, or whether the evidence is so one sided that HonFed must prevail as a matter of law. (*See Anderson v. Liberty Lobby, Inc.*, slip op. at 9, ___ U.S. ___, ___, 106 S.Ct. 2505 (June 25, 1986).)

II. Discussion

A. Extrinsic Evidence Gathered on Remand

HonFed deposed six of its current or former personnel, and of those six, none ever questioned the "congruency" of the escalation language in the promissory notes with the escalation language in the mortgages. Furthermore, five of the six HonFed people deposed testified consistently that the escalation clause in both the promissory note and the mortgage allowed HonFed to increase the interest rate by as much as one and one-half percent (with three months notice), and that HonFed could do so as often as once every year. (*See* HonFed's Memo in Support, Exhibit D at 14-16, 24, Exhibit E at 37-40, Exhibit G at 34-35, Exhibit J at 39, and Exhibit K at 41.) Although one former loan officer and marketing vice-president (Harry Endo) testified that he "had no idea, no understanding" about per-

missible increases under the escalation clause of either the mortgage or the note (*id.*, Exhibit L at 37-38), the court finds that Endo's testimony does not raise a question of fact regarding HonFed's intent. Instead, the testimony is simply of no aid in establishing the terms of the home loan agreements.

In addition to the testimony highlighted above, the court notes that HonFed's actions in 1974 and 1981 were consistent with the statements of its personnel that the interest rate could be raised one and one-half percent over the prior rate "then in effect."

In opposition to HonFed's motion, plaintiffs rely on the deposition testimony of Harris Murabayashi and William Ebina as evidence of a sufficient disagreement to create a question for the jury with regard to the terms of the home loan agreements. According to testimony at page 47-48 of Murabayashi's deposition (HonFed's Memo in Support, Exhibit M), Murabayashi asked a woman present when he signed his documents the meaning of the escalation provision contained in the mortgage and the note. As Murabayashi remembers, the woman said:

> Don't worry about it. It's in all our documents, our agreements. It's never been used before and it has only up to one and a half percent over the interest rate that I [sic] was signing for, six and a quarter, over the lifetime of the loan.

When asked whether he had a specific recollection that the woman said over the lifetime of the loan, Murabayashi replied, "Not specific but implied because if she had told me that this thing could go up every year I would never have signed it." (*Id.* at 48.) Murabayashi's further testimony reveals his "recollection" as nothing more than a conclusion based on the sense that "if she had told me that [the interest rate] can go up one and a half percent every time they felt like it I never would have signed it." (*Id.* at 50; *see also id.* at 52-57.) The court finds that

Murabayashi's testimony does nothing to establish the terms of the home loan agreements.

As for William Ebina, his testimony is even less helpful than Murabayashi's. Ebina claims that he was never told of HonFed's claimed right to raise the interest rate and that until the 1974 interest rate increase, he thought the rate was fixed at six and one-quarter percent. Plaintiffs claim that Ebina's testimony reveals a conflict between the statements of HonFed personnel that "we told everyone" and that Ebina's apparent contradiction goes to the reasonable expectations of the borrower. However, the court need only point out that Ebina's payment of the 1974 increase without complaint demonstrates that his expectations of a fixed rate mortgage were *not* reasonable. Thus, neither does the testimony of Ebina help resolve the ambiguity identified by the Ninth Circuit.

Lastly, plaintiffs claim that the eight percent default rate provided in the mortgage represents an internal inconsistency since it does not make sense for a lender to have the ability to raise the interest rate through an escalation clause to eight and three-quarters percent (or higher) when a defaulting borrower's interest rate is limited by the terms of the mortgage to eight percent. However, HonFed has many options under the default clause—and the eight percent per annum rate is just one of them. (*See* HonFed's Memo in Support, Exhibit B at 2, ¶ 4.) As a result, the default clause is not probative with respect to the terms of the home loan agreements.

B. Is There an Issue for the Jury?

As set forth in Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate only when the pleadings and other submissions show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Filco v. Amana Refrigerator, Inc.*, 709 F.2d 1257, 1260 (9th Cir. 1983). In

addition, the indulgence required at the trial level mandates the court to view the evidence and draw all inferences in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970). A corollary of the above is that a court must not *weigh* conflicting evidence. *CIA. Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 412 (1st Cir. 1985).

The Supreme Court has recently noted that *Adickes* and other cases indicate that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for the party. *Cities Service*, 391 U.S. at 288-299. If the evidence is merely colorable [citations omitted], or is not significantly probative, *Cities Services, supra*, at 290, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, slip op. at 7, ___ U.S. ___, 106 S.Ct. 2505 (June 25, 1986).

The court recognizes that the resolution of the meaning of an ambiguous contract is for the jury. *FILMO v. Kaiser Aluminum*, 684 F.2d 776, 780 (11th Cir. 1982); *United States for Union Building Materials Corp. v. Haas & Haynie Corp.*, 577 F.2d 568, 572 (9th Cir. 1978). However, to prevail at trial, plaintiffs must establish that the parties intended the loan documents to limit the permissible interest rate increase to one and one-half percent over the life of the loan.

Given plaintiffs' burden at trial, the most relevant citation in this case is not to a case involving the interpretation of ambiguous contracts, but instead to a Supreme Court case decided the same day as *Liberty Lobby*:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In

> such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, ___ (1986).

Celotex Corp. v. Catrett, slip op. at 5, ___ U.S. ___, 106 S.Ct. 2548 (June 25, 1986).

In this instance, defendants case is even stronger than the movants' case in *Celotex*. While there was no real dispute in *Celotex* that the movant need not provide affirmative evidence disproving the plaintiff's case (*see id.* at 1 (White, J., concurring) and *id.* at 1 (Brennan, J., dissenting)), certain members of the Court were not convinced that the moving party had met its burden of production. In this case, not only has HonFed satisfied its initial burden of production, it has also met the ultimate burden of persuasion, "which always remains on the moving party. [Citations omitted]." *Id.* at 2 (Brennan, J. dissenting). In fact, the court finds the state of defendant's evidence so overwhelming that were the case to go to trial, the court would grant a motion for directed verdict under Fed. R. Civ. P. 50(a).

Accordingly, the court GRANTS defendant HonFed's motion for summary judgment. Counsel for defendant will prepare the order.

DATED: Honolulu, Hawaii, Aug. 11, 1986.

Martin Pence
UNITED STATES DISTRICT JUDGE

APPENDIX D
[Filed June 3, 1988]
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRIS N. MURABAYASHI; MIWAKO S. MURABAYASHI; WILLIAM H. EBINA; BETSY S. EBINA; and DURINE CHIYO KANAI, borrowers, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally funded chartered savings and loan association, Defendant-Appellee.	NO. 86-2503 DC # CV-81-423-MP MEMORANDUM*

Appeal from the United States District Court for the District of Hawaii Martin Pence, District Judge, Presiding

Argued and Submitted April 6, 1988
Honolulu, Hawaii

Before: WALLACE, REINHARDT, and NOONAN, Circuit Judges

* This disposition is no appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. Rule 36-3.

Harris N. Murabayashi and others brought a class action against Honolulu Federal Savings and Loan Association (HonFed). The plaintiffs were borrowers at 6.25 percent on 20 year home mortgages in the 1960's from HonFed. They sought a declaratory judgment that the maximum increase permissible by the terms of their loans was 1.5 percent. They also sought damages for violation of the federal Truth in Lending laws, 15 U.S.C. 1640, *et seq.*, and Regulation Z issued thereunder, 12 C.F.R. 226. They sought further relief under the Unfair Practices Act, H.R.S. § 480-2.

The district court granted summary judgment in favor of HonFed. This court reversed. *Murabayashi v. Honolulu Federal Savings and Loan Association*, unpublished opinion, October 1, 1984. The district court had held that the terms of the loan agreements "unambiguously permit HonFed to raise the interest rate 1.5 percent per annum over three months, or 6 percent per year." Slip op. p.2. We, however, observed that the notes did not comprise the entire agreement to be interpreted. Each promissory note had been executed together with a home mortgage. Under Hawaii law, the note and the mortgage had to be interpreted together. The mortgages did not permit HonFed to raise the interest rate over the interest rate "on said note." We held as follows:

> It is unclear whether the phrase "on said note" means that the limitation on interest rate increases must be measured from the original interest rates on the home loans or from the interest rates as they changed over the life of the loan. We therefore conclude that the phrase "on said note" used in the mortgages is ambiguous because "there is a doubt" about its meaning. Slip op. p.2.

We further noted that "unclear language in a mortgage is resolved against the drafter." But we permitted the

parties to present extrinsic evidence to establish the terms of the agreements.

On remand six persons connected with HonFed were deposed by the plaintiffs. James Hallstrom, former chairman of the board of HonFed, testified that he understood the note permitted the bank to raise the interest rate "1 1/2 percent per annum and then as often as we care to do that, that is what we always explained to people." He said again that he understood "we had the right to escalate 1 1/2 percent every year, with proper notice." Similar testimony was offered by Richard Hee, a former loan officer of HonFed, that each year HonFed had the right to increase the interest rate 1 1/2 percent.

Two other former officers of HonFed said there was no discussion at the bank about the language of the mortgage and the language of the note. Richard H. Fukagawa, a former executive vice president of HonFed, testified categorically that there were no discussions regarding the language of the mortgage comparing it with the language of the note. Isamu Harry Endo, a former loan officer and vice president for marketing, testified that he had no understanding whether there was any limit on interest rate escalations during the life of the loan.

It is apparent that the testimony of Hallstrom and Hee takes a view of the note and mortgage which is different from the face of the note. The face of the note, as already construed by the district court, permits an escalation, after three years, of 6 percent per year over the interest rate in existence the previous year. All that is needed is for HonFed to give the appropriate three month notice four times each year. As was admitted by counsel for HonFed in oral argument, this plain meaning of the note leads to astronomical interest rates in the later years of a 20-year note. Neither Hee nor Hallstrom believed that that was what the bank could get. Consequently, they must have

believed that the interest rate was somehow held in check by the terms of the mortgage.

The mortgage, as this court has already held in its prior opinion, was ambiguous and had to be construed against its drafter, HonFed. Not only was the mortgage ambiguous in the way this court has already held. There was a further ambiguity in that in the event of default as to any term of the mortgage, HonFed had the right to interest at the rate of 8 percent per annum. It is, of course, difficult to believe that an interest rate on its note could be escalated by the bank well above 8 percent while the default provision provided for only 8 percent.

HonFed appears to have misunderstood the burden that was placed upon it by the prior decision of this court. The court had found an ambiguity in the mortgage. HonFed had the burden of proving that the meaning of the mortgage, construed against it, did not control the note. HonFed failed to meet this burden. Instead, the testimony of Endo and Fukagawa show that HonFed had not confronted the problem. The testimony of Hallstrom and Hee show that the bank had an understanding of a note that was contrary to its plain meaning. We now accordingly hold that the note read together with the mortgage was ambiguous; that the ambiguity is to be construed against the drafter; and that therefore the maximum permissible interest on the loan was a raise of 1 1/2 percent during the life of the loan.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS DISPOSITION.

WALLACE, Circuit Judge, concurring and dissenting:

We have a single issue before us: did the district court err in granting summary judgment to HonFed. I agree

that it did so because the note and the mortgage are ambiguous and HonFed's extrinsic evidence does not resolve the ambiguity in favor of HonFed. We need not and I would not go any further. Therefore, I disagree with the majority that we should conclude that the maximum permissible interest on the loan was a raise of 1 1/2 percent during the life of the loan. Rather, we should simply reverse the summary judgment for HonFed and remand for trial. On remand, the plaintiffs could, of course, bring their own motion for summary judgment on this issue.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HARRIS N. MURABAYASHI; MIWAKO S. MURABAYASHI; WILLIAM H. EBINA; BETSY S. EBINA; and DURINE CHIYO KANAI, borrowers, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, vs. HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, a federally funded chartered savings and loan association, Defendant-Appellee.	NO. 86-2503 DC # CV-81-423-MP ORDER

Before: WALLACE, REINHARDT, and NOONAN, Circuit Judges

Judges Reinhardt and Noonan have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Wallace votes to grant the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.